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Supreme Court of the United States

OCTOBER TERM, 1953

NO. 369

KEYSTONE METAL COMPANY, Petitioner,

v.

CITY OF PITTSBURGH, JAMES P. KIRK, Treasurer of the City of Pittsburgh, SCHOOL DISTRICT OF PITTSBURGH, et al., etc., Respondents.

PETITION OF KEYSTONE METAL COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EARL F. REED
LEE W. ECKELS
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh 19, Pennsylvania
Attorneys for Petitioner

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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PETITION OF KEYSTONE METAL COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Keystone Metal Company, respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of Pennsylvania, entered June 26, 1953, affirming in part and reversing in part a decision of the Court of Common Pleas of Allegheny County, Pennsylvania, entered October 29, 1952.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A. The Proceedings Below.

These proceedings arise out of petitions filed in the Court of Common Pleas of Allegheny County, Pennsylvania, by Keystone Metal Company (hereinafter called "Keystone") appealing certain deficiencies in mercantile license taxes assessed against Keystone by the Respondents, City of Pittsburgh (hereinafter called "City") and School District of Pittsburgh (hereinafter called "School District"). The deficiencies here involved relate to Keystone's mercantile tax liabilities for the calendar year 1948, amounting to $9,935.37, plus penalties and interest in the amount of $4,023.32, in the case of the City, and $4,967.63, plus penalties and interest in the amount of $2,011.91, in the case of the School District.

The appeals from the City and the School District assessments were consolidated for trial upon facts stipulated by the parties, and the chief issue was whether or not the tax deficiencies in question were illegal by reason of being imposed upon receipts derived from sales in interstate commerce. The trial court by decree dated February 20, 1952, dismissed Keystone's appeals, concluding as a matter of law that even though the sales in question constituted business in interstate commerce, the mercantile tax assessments did not contravene the commerce clause of the Federal Constitution.

Keystone filed exceptions to the decree and conclusion of the trial court, and these exceptions came before the court *en banc* which, by a decree entered on October 29, 1952, affirmed the ruling of the trial judge except that

it relieved Keystone of all penalties and interest accrued against the deficiency assessments.

Keystone appealed so much of the said ruling as upheld the deficiency assessments to the Supreme Court of Pennsylvania, and the City and School District filed cross-appeals from so much of the said ruling as relieved Keystone from the payment of penalties and interest.

The Supreme Court of Pennsylvania in an opinion filed on June 26, 1953, reported at 374 Pa. 323, affirmed the decision of the court below relative to the propriety of the deficiency assessments and reversed the decision of the court below on imposition of penalties and interest.

B. The Facts of the Case.

Act No. 481 of the General Assembly of Pennsylvania, approved June 25, 1947 (53 P. S. 2015.1-2015.8), authorized the City of Pittsburgh to impose such taxes as it should determine upon persons, transactions, occupations, privileges, subjects and personal property within the limits of the City. Pursuant to said enabling act, the City, by Ordinance No. 488 of 1947, imposed a Mercantile License Tax, effective January 1, 1948, on wholesale and retail vendors of goods, wares and merchandise, said tax being measured by the actual or formula-computed gross receipts of each such vendor during the preceding calendar year.

Act No. 320 of the General Assembly, approved June 20, 1947, P. L. 745 (24 P. S. 582.1 *et seq.*) imposed in behalf of the School District of Pittsburgh a Mercantile License Tax similar to that enacted by the City.

Keystone is engaged in the business of buying, selling and dealing in nonferrous metals, conducting its business from an office in the City of Pittsburgh. During the period here in question, Keystone sold large quantities of copper scrap to Westinghouse Electric Corporation (hereinafter called "Westinghouse") and National Electric Products Corporation (hereinafter called "National"). Both such corporations are Pennsylvania corporations, and both at all times here material maintained offices in Pittsburgh. (R. 5-6, 31)

All such sales of copper scrap to Westinghouse and National in the base period were made in the following manner:

Westinghouse and National, during the year 1947, had placed purchase orders for specified quantities of copper scrap with Keystone's predecessor. Such purchase orders specified that the copper scrap was to be shipped to a refinery operated by the American Metal Company at Carteret, New Jersey, shipment to be made in 45 to 60 days after the order was placed, by prepaid freight, f.o.b. destination. Each such purchase order called for specified amounts of copper scrap which could be of three different grades, and specified a tentative delivery price for each of such three grades of copper, such tentative prices to be adjusted to conform to the prevailing market prices for copper scrap quoted in a specified trade magazine on the date of shipment. Such purchase orders contemplated that upon delivery to the refinery at Carteret, New Jersey, the copper scrap was to be assayed or analyzed to determine metal content, grade and weight of the shipment, such assay or analysis to be de-

terminative of the final price of each shipment. (R. 6-7, 33)

In taking over the business of its predecessor, Keystone fulfilled these orders during the year 1947. In fulfilling such orders *Keystone placed its own purchase orders for copper scrap* of the qualities and in the amounts specified in the Westinghouse and National purchase orders, *with suppliers located,* with two exceptions, *outside Pennsylvania.* Such suppliers then shipped the copper scrap directly to the refinery at Carteret, New Jersey, for the account of Westinghouse or National, as the case might be. (R. 7, 33) The suppliers immediately notified Keystone of such shipment and thereupon received from Keystone 80% of the tentative price agreed upon in advance for such shipment by Keystone and the supplier. Such price was subject to later adjustment based on the results of assay or analysis of the shipment after delivery at the refinery. Upon receiving notice of such shipments from its suppliers, Keystone immediately billed Westinghouse or National, as the case might be, for 80% of the tentative price under the Westinghouse or National purchase orders. (R. 9-10, 34).

Upon delivery of each shipment of copper scrap to the refinery, it was assayed or analyzed to determine metal content, weight or grade, the cost of such analysis being shared equally by Keystone and Westinghouse or National. If the scrap as assayed satisfied specifications, the shipment *was accepted* by American Metal Company on behalf of Westinghouse or National, as the case might be. (R. 7-8, 35) After the assay of each shipment had determined the exact quality and weight of copper, Westinghouse or National sent Keystone

statements showing the results of the assay, the price adjustments, the final price of the shipment and the balance due Keystone. Keystone then forwarded such information to its supplier and paid the balance to the supplier for each shipment. (R. 10-11, 34)

Following the acceptance of each shipment of copper scrap *at the refinery, Westinghouse or National,* as the case might be, then *traded the particular shipment to the American Metal Company for an equal weight of refined copper and paid American Metal Company the difference between the then current market price of copper scrap and the higher current market price of refined copper.*

Such exchange was effected in two steps: (a) the refinery shipped the refined copper to a rolling mill located in either New York or Connecticut, which was designated by Westinghouse or National, for the account of Westinghouse or National; and (b) the refinery simultaneously took title to the scrap shipment received from Keystone's supplier and co-mingled it with its existing inventory of copper scrap. Thereafter the refinery used its constantly replenished scrap copper inventory in its smelting and refining operations and disposed of the refined copper so produced to its customers in the ordinary course of business. (R. 8-9, 35-36)

The deficiencies in mercantile license taxes assessed against Keystone by the City and School District resulted principally from the inclusion of these sales to Westinghouse and National in Keystone's gross volume of business for the calendar year 1947. (R. 12, 37)

Based on the facts as found, the trial court made the following conclusions of law, *inter alia*:

"3. The transactions between plaintiff and Westinghouse Electric Company and between plaintiff and National Electric Products Corporation, in which plaintiff orders copper scrap from suppliers within and without Pennsylvania to be shipped by such suppliers to an independent refinery in New Jersey, constituted business in interstate commerce.

"4. Because no state other than Pennsylvania could impose excise taxes measured by gross receipts upon the above transaction, the mercantile taxes of defendants could not operate to regulate such commerce in contravention of Article I, Section 8 of the Constitution of the United States." (R. 51)

In due course Keystone filed exceptions, *inter alia*, to the fourth conclusion of law, set out above, and to the trial court's failure to grant Keystone's thirty-fourth and thirty-sixth requests for findings of facts and conclusions of law, which requests read as follows:

"34. The City and School mercantile license taxes are taxes on the privilege of carrying on the business of selling goods and merchandise."

"36. To the extent that in the computation of Keystone's mercantile license tax liabilities there are included in the annual gross volume of business the proceeds of sales in interstate commerce such taxes are direct taxes upon such interstate commerce, which no state or municipality may constitutionally impose."

No exception to the trial court's third conclusion of law was taken by either the City or the School District.

The lower court *en banc* on October 29, 1952, sustained Keystone's exception to the trial court's failure to grant its thirty-fourth request for findings of fact and conclusions of law. (R. 77, 78) However, the court *en banc* sustained the trial court in all other respects and entered a final decree ordering Keystone to pay the amounts of the respective deficiency assessments levied for the calendar year 1948, but without penalties or interest. (R. 77-79)

The Supreme Court of Pennsylvania in its opinion filed on June 26, 1953, held that the sales in question, while transactions "in interstate commerce", contained certain "intrastate events" or "local activities" justifying the imposition of the tax.

It is to review that decision that the present Petition is being filed.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. Code, Section 1257(3). The validity of the following state statute and municipal ordinance *as applied in this case* is drawn in question on the ground that as so applied they are repugnant to the Constitution of the United States:

(1) The Pennsylvania Act of June 20, 1947, P. L. 745 (24 Purdon's Statutes Secs. 582.1 *et seq.*)—This Act imposes in behalf of Pennsylvania school districts of the first class a temporary mercantile license tax on wholesale and retail vendors of goods, wares and merchandise. The tax for each year is measured by the gross receipts of the taxpayer for the preceding calendar year, and while the Act itself provides that no tax may be levied or collected on any portion of any business not within the taxing power of the Commonwealth under the Constitution of the United States, the statute *as applied by the Court below* is measured in this case by the gross proceeds of sales in interstate commerce in violation of Article I, Section 8, of the Constitution.

(2) City of Pittsburgh Ordinance No. 488 of 1947. (R. 15a-25a). This ordinance imposes a city mercantile license tax on wholesale and retail vendors of goods, wares and merchandise. The tax for each year is measured by the gross receipts of the taxpayer for the preceding calendar year. The tax imposed upon petitioner by this ordinance, *as applied by the Court below,* is measured by the gross proceeds of sales in interstate commerce in violation of Article I, Section 8, of the Constitution.

The decision of the Supreme Court of Pennsylvania entered on June 26, 1953, is sought to be reviewed by the within Petition.

Petitioner relies for jurisdiction on the principle that where the question of the validity under federal law of a state statute, *as construed and applied,* has been presented for decision or has been decided by the highest court of a state, this Court will take jurisdiction under Title 28, U.S. Code, Section 1257(3). See *Wilson v. Cook,* 327 U.S. 474, 480, 66 S. Ct. 663, 666 (1946), and cases therein cited.

It is contended that the questions involved are substantial for the reasons set forth *infra* for the allowance of the Writ of Certiorari.

The federal question here sought to be reviewed was first raised by petitioner in its petition for appeal from the tax assessment involved and was argued before the trial judge. In his opinion (R. 40) the trial judge stated that "an exhaustive search of authorities has shown that this factual situation has never been presented for decision by the United States Supreme Court". The trial court concluded (R. 51) that the transactions in question "constituted business in interstate commerce", but that because no state other than Pennsylvania could impose excise taxes measured by gross receipts upon the transactions, the mercantile taxes appealed from did not contravene Article I, Section 8, of the Constitution.

Petitioner filed exceptions (R. 13) to the decree *nisi* of the trial judge, again raising the question of constitutionality. These exceptions were argued before the court *en banc,* and in its Opinion (R. 66) said court

agreed with the trial court that the disputed sales were in interstate commerce and held that, although the taxes hence were directly on interstate commerce, they did not violate the federal Constitution.

Petitioner again raised the Constitutional question on appeal to the Supreme Court of Pennsylvania from the decree of the court *en banc*, and that Court in its opinion (R. 88-90) held that while the transactions as a whole were in interstate commerce, the tax was valid under the federal Constitution on the basis of certain decisions of this Court cited in that opinion.

QUESTIONS PRESENTED

1. Whether the Pennsylvania statute (Act of June 20, 1947, P. L. 745, as amended) imposing a school mercantile license tax upon the privilege of carrying on locally the business of selling goods, wares and merchandise violates Article I, Section 8, of the Constitution of the United States to the extent that the tax imposed by said Act is measured by the gross proceeds of sales in interstate commerce.

2. Whether ordinance No. 488 of 1947 of the City of Pittsburgh enacted pursuant to authority contained in the Pennsylvania Act of June 25, 1947, P. L. 1145, imposing a mercantile license tax upon the privilege of carrying on locally the business of selling goods, wares and merchandise violates Article I, Section 8, of the Constitution of the United States to the extent that the tax imposed by the said ordinance is measured by the gross proceeds of sales in interstate commerce.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

1. The decision of the Court below is in conflict with applicable decisions of this Court which hold that local taxes imposed upon the privilege of engaging in business activities violate Article I, Section 8, of the Constitution of the United States to the extent said taxes are measured by the gross receipts of sales in interstate commerce.

2. The decision of the Court below is in conflict with applicable decisions of this Court which hold that the local taxation of gross receipts from interstate commerce is unconstitutional without regard to whether the interstate transactions from which the receipts are derived are subject to taxation by other states.

3. The decision of the Court below, if permitted by this Court to stand, will establish the obviously unsound constitutional principle that payment of a local Pennsylvania tax may be made a condition to the exercise in Pennsylvania of the privilege of engaging locally in interstate commerce.

4. The decision of the Court below subjects the constitutionally-protected privilege of engaging locally in interstate commerce to local taxation.

Respectfully submitted,

KEYSTONE METAL COMPANY, Petitioner,

By—EARL F. REED

LEE W. ECKELS

Attorneys

EARL F. REED
LEE W. ECKELS
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh 19, Pa.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinions of the Court of Common Pleas of Allegheny County, Pennsylvania were filed on February 20, 1952 and October 29, 1952, respectively. These Opinions were not officially reported, but are included in the record certified to this Court (R. 37; R. 54).

The Opinion of the Supreme Court of Pennsylvania was filed on June 26, 1953 and is officially reported at 374 Pa. 323. This Opinion is also included in the record certified to this Court (R. 85).

JURISDICTION

The judgment sought to be reviewed is a final judgment of the Supreme Court of Pennsylvania, *affirming* in part a decision of the Court of Common Pleas of Allegheny County, Pennsylvania. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257 (3).

STATEMENT OF THE CASE

The essential facts are recited in the Petition under the caption "Summary Statement of the Matter Involved" (see pages 2 to 8, *supra*) and therefore are not repeated in this brief.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Pennsylvania erred in the following particulars:

1. In failing to follow the applicable decisions of this Court which hold that local privilege taxes may not be imposed upon the gross receipts of transactions in interstate commerce.

2. In ruling that Article I, Section 8 of the Constitution of the United States does not prohibit the City and School District of Pittsburgh from imposing their mercantile license taxes upon the gross proceeds of the interstate sales made by Keystone to Westinghouse and National.

3. In holding that the local taxation of gross receipts from sales in interstate commerce is unconstitutional only where such interstate sales are subject to taxation by other states.

4. In applying to this case decisions of this Court holding that Article I, Section 8 of the Constitution of the United States does not prohibit the local taxation of intrastate activities merely because such activities have incidental interstate attributes.

SUMMARY OF THE ARGUMENT

It has been established that the sales by Keystone to Westinghouse and National are sales in interstate commerce (R. 51, 67, 88). It has also been established that the mercantile license taxes of the City and School District of Pittsburgh are taxes imposed upon the privilege of engaging in local business activities: *Federal Drug Company v. Pittsburgh*, 358 Pa. 454, 57 A. 2d 849 (1948). The sole question presented for decision, therefore, is whether a local tax imposed upon the privilege of engaging locally in interstate commerce and measured by the gross receipts from such commerce violates the "commerce clause" of the United States Constitution. This Court has previously decided this question in a number of cases, holding that a local privilege tax may not be imposed upon the gross receipts of sales in interstate commerce. The court below erred in failing to follow these cases.

The two grounds on which the court below based its decision are without merit. The court erroneously

applied the so-called multiple burden theory and held that even though the sales involved were sales in interstate commerce, the City and School District could tax the gross proceeds of such sales since no other state could impose a tax upon the transactions. This Court put an end to the multiple burden theory in *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946), wherein it was held that the imposition of a local privilege tax upon the gross receipts of sales in interstate commerce is a direct tax on interstate commerce and therefore unconstitutional.

As the second ground for its decision the court below erroneously followed decisions of this Court holding that a state is not prohibited from taxing intrastate transactions merely because such transactions have incidental interstate attributes. These decisions have no application to the case here where the transactions involved are not intrastate in character but are entirely in interstate commerce.

ARGUMENT

I. The court erred in failing to follow the applicable decisions of this Court which hold that local privilege taxes may not be imposed upon the gross receipts of transactions in interstate commerce by ruling that Article I, Section 8, of the Constitution of the United States does not prohibit the City and School District of Pittsburgh from imposing their mercantile license taxes upon the gross proceeds of the interstate sales made by Keystone to Westinghouse and National.

The present case has now been before the courts of Pennsylvania for consideration on three separate occasions. In the process, the wheat has been separated from the chaff and certain legal conclusions which were originally in issue have now become firmly established. It might be advisable before beginning a discussion of the issues here involved to briefly summarize these established legal principles so as to sharply define the precise question which is presented to this Court.

The first legal principle so established by the Pennsylvania courts is that the sales of copper scrap by Keystone to Westinghouse and National were sales in interstate commerce. The trial judge so found in his conclusions of law (R. 51) and both the lower court *en banc* and the Supreme Court of Pennsylvania have recognized the validity of this legal conclusion (R. 67; R. 88).

A second legal principle having a bearing on the question presented here which is now firmly fixed is that the mercantile license taxes imposed by the City and School District are taxes on the privilege of carrying on the business of selling goods and merchandise. This legal

conclusion was made by the Court *en banc* on the basis of *Federal Drug Company v. Pittsburgh,* 358 Pa. 454, 57 A. 2d. 849 (1948) (R. 64). See also *Allegheny County Motor Co. v. Pittsburgh,* 360 Pa. 407, 62 A. 2d. 64 (1948); *Blauners, Inc. v. Philadelphia,* 330 Pa. 340, 198 A. 889 (1938) and *Puntureri v. Pittsburgh School District,* 359 Pa. 596, 60 A. 2d. 42 (1945) wherein it was said (p. 599):

> "* * * the mercantile license tax * * * is a tax on the privilege of selling goods and merchandise of any kind and nature whatsoever, and * * * is measured by the gross volume of business transacted annually".

Therefore, it having been established that the transactions involved here between Keystone and Westinghouse and National were sales in interstate commerce and that the mercantile license taxes imposed by the City and School District are taxes on the privilege of carrying on local business activities, the sole question presented to this Court may be stated as follows: Is a local tax, imposed upon the privilege of engaging locally in interstate business activities, measured by the gross receipts from such interstate activities, unconstitutional, as being in violation of Article I, Section 8, of the Constitution of the United States? This question is not a new one. It has been before this Court on a number of occasions and in every case has been answered in the affirmative.

In *Crew Levick Co. v. Pennsylvania,* 245 U.S. 292, 38 S. Ct. 126 (1917), the tax involved was the mercantile license tax imposed by the Commonwealth of Pennsylvania under the Act of May 2, 1899, P.L. 184, a tax identical with the present taxes imposed by the City and

School District. It was held by this Court, in that case, that the tax was unconstitutional insofar as it was measured by the gross receipts from merchandise shipped from Pennsylvania to foreign countries. Although that case involved foreign sales, it applies with equal force to gross receipts from interstate sales, the Court having pointed out in its opinion that as far as the issue there involved was concerned, it made no difference whether the commerce was foreign or merely interstate and that a state privilege tax such as this, measured to any extent by gross receipts of either foreign or interstate commerce, was invalid. *It is submitted that the Crew Levick case is controlling on the present case.*

In *Gwin, White & Prince v. Henneford,* 305 U.S. 434, 59 S. Ct. 325 (1939), the State of Washington imposed "a tax for the act or privilege of engaging in business activities" upon every person "engaging within this state in any business activity". In determining the tax liability of the plaintiff, the taxing authorities included in its gross volume of business, on which the tax was measured, gross receipts from sales of fruit shipped from Washington to various out-of-state destinations. This Court held that the tax was invalid insofar as it was measured by the gross receipts of these interstate sales.

J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 58 S. Ct. 913 (1938), involved the Indiana gross income tax, which tax was characterized by the Attorney General of Indiana as a privilege tax upon the receipt of gross income. It was held in that case that the tax was unconstitutional insofar as it was imposed on taxpayer's gross income from sales in interstate and foreign commerce.

Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274 (1946), is a more recent decision involving the same tax dealt with in the *Adams* case. It was there expressly held that the imposition of the tax on the gross receipts of sales of securities made in interstate commerce was in violation of the "commerce clause" of the Constitution of the United States.

The Pennsylvania Supreme Court held that the above cases had no application to the present question because in all those cases the sellers and buyers were from different states while here the sellers and buyers are both residents of Pennsylvania. It is our contention that the residence of the parties to a transaction in interstate commerce is not material to the question of whether a state is prohibited by the Constitution from taxing the proceeds of the transaction or measuring the tax by the amount of such proceeds.

The Pennsylvania court has confused the question of whether a state has the right to impose a tax on a transaction in interstate commerce *with the closely allied question of whether the transaction is one in* intrastate commerce *and for that reason not outside the purview of the state's taxing powers.* Undoubtedly the residence of the parties to a sale of goods is one of the factors which must be considered in determining whether a transaction constitutes a sale in intrastate commerce or one in interstate commerce. However, once this determination has been made, the residence of the parties is of no further significance. The sole question then becomes one of constitutional powers to which the residence of the parties involved in the transaction in question has no relevance.

In drawing a distinction between the present case and the cases cited above based on the residence of the parties to the transaction involved, the court below is in effect saying that while the transactions in the present case and in the cited cases are all in interstate commerce, the transactions in the above cases have more of an interstate character than those involved here and for that reason those cases do not serve as precedent. Such reasoning is clearly erroneous. This Court has never recognized *degrees* of interstate commerce, the application of the "commerce clause" being difficult enough without attempting to divide interstate transactions into various categories and applying different rules to each category. Although the transactions in the present case, because of the residence of the parties concerned, may have less of an interstate character than those in the other cases, they are nevertheless, as found by the court below, sales in interstate commerce and the basic principles set forth in the cited cases must be applied to them. Those cases hold that local taxes imposed upon the privilege of doing business locally cannot be measured by the gross proceeds of sales in interstate commerce. The decision of the Pennsylvania Supreme Court holding that the privilege taxes imposed by the City and School District may be measured by the gross proceeds of the interstate sales of copper scrap to Westinghouse and National is in direct conflict with those cases.

II. The court erred in holding that the local taxation of gross receipts from sales in interstate commerce is unconstitutional only where such interstate sales are subject to taxation by other states.

The Pennsylvania court's decision was based on two separate grounds, which we shall consider in turn. First, the court adopted the so-called multiple burden theory on which the Allegheny County court based its decision (R. 90-91).

There is no authority to support the multiple burden theory as applied by the court below, i.e., that the local taxation of gross receipts from interstate commerce is constitutionally valid where the transaction in interstate commerce is not possibly subject to tax by another state. The cases of *J. D. Adams Manufacturing Co. v. Storen, supra, Gwin, White & Prince v. Henneford, supra,* and *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S. Ct. 546 (1938) are relied on in support of this theory. True, those cases state, in no uncertain terms, that the evil of a tax measured by the gross receipts from interstate commerce is that if one state is free to tax such commerce then every state which such commerce touches may levy a tax upon it, and thus interstate commerce becomes subject to multiple tax burdens. Those cases go no further. They do not directly hold, as did the court below, that gross receipts from interstate commerce may be taxed by a state if no other state can possibly tax such commerce; nor does any case so hold. Admittedly, the statements in those cases are susceptible to such an inference. They are equally susceptible to the interpretation that because of the inherent risk of multiple taxation of the fruits of interstate commerce, the taxation of the

gross receipts from interstate commerce will be deemed invalid as a direct tax on such commerce and *no* state will be permitted to impose a tax upon such receipts.

This Court in *Freeman v. Hewit, supra,* left no doubt as to which of these two interpretations is the correct one. There, applying the same tax statute that was involved in the *Adams* case, to an almost identical set of facts, the Court refused to place its decision on the ground that a local privilege tax measured by the gross receipts from sales in interstate commerce is invalid only if some other state can possibly tax such commerce (as was vigorously urged by Justice Rutledge in his concurring opinion) but rested its decision squarely on the ground that a privilege tax imposed upon the gross receipts of interstate sales is absolutely prohibited as a direct tax on interstate commerce. The basis of this Court's decision is clearly brought out in the following excerpts from its opinion:

"* * * In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, *but by its own force created an area of trade free from interference by the States.* In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. * * * (Emphasis supplied) (329 U.S. at 252)

* * * * * * *

"* * * To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied.

"As a practical matter, it can make such commerce pay its way * * * apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other states. * * *

"* * * While these permitted taxes may in an ultimate sense, come out of interstate commerce, they are not, *as would be a tax on gross receipts, a direct imposition* on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause. (Emphasis supplied) (329 U.S. at 255-56).

* * * * * * *

"It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. *Nor is there any warrant in the constitutional principles hereto-*

*fore applied by this Court to support the notion that a State may be allowed one single tax-worth of direct interference with the free flow of commerce. * * *"* (Emphasis supplied) (329 U.S. at 256).

III. The court erred in applying to this case decisions of this Court holding that Article I, Section 8 of the Constitution of the United States does not prohibit the local taxation of intrastate activities merely because such activities have incidental interstate attributes.

As the second ground for its ruling, the Pennsylvania Supreme Court held that the case here was governed by the following decisions of this Court: *International Harvester Co. v. Department of Treasury,* 322 U. S. 340, 64 S. Ct. 1019 (1944); *Department of Treasury of Indiana v. Wood Preserving Corporation,* 313 U.S. 62, 61 S. Ct. 885 (1941); *Wiloil Corporation v. Commonwealth of Pennsylvania,* 294 U.S. 169, 55 S. Ct. 358 (1935); *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 60 S. Ct. 388 (1940); *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S. Ct. 1264 (1949); *Norton Company v. Department of Revenue of Illinois,* 340 U.S. 534, 71 S. Ct. 377 (1951); *Western Live Stock v. Bureau of Revenue* 303 U.S. 250, 58 S. Ct. 546 (1938). (R. 88-89) Analysis of the above cases reveals that the transactions therein involved can be placed into three different categories. The nature of the transactions now under consideration is entirely different from that of the transactions in each of these three categories. For that reason, the cases cited by the Pennsylvania court have

no application to the question that was before that court.

Cases in the first category, such as the *Wood Preserving* case, involve the situation where the seller makes delivery of goods to the buyer, or his agent, within the jurisdiction of the taxing state and the buyer after receiving the goods ships them to a point outside the state. In that situation there are two separate and distinct transactions, one wholly intrastate in character followed by one in interstate commerce. The first transaction on which the tax is imposed is entirely completed within the jurisdiction of the taxing state before the second transaction involving interstate commerce begins. Obviously, this is completely different from the situation here where there is but a single transaction and it is one in interstate commerce.

The court below attempting to put the Keystone sales to Westinghouse and National into the above category stated that the effect of such sales was the same as if Keystone had delivered copper scrap to Westinghouse and National in Pittsburgh and these purchasers had then shipped it to the refinery in New Jersey; that the purpose of making shipment direct to the refinery was merely a "short-cut". Nothing could be farther from the facts. It was contemplated by the parties to these sales that the sale was to be complete only when the scrap delivered was assayed and analyzed at the refinery. (R. 8). Upon the assay and analysis of each shipment at the refinery such of the scrap as came up to specification was to be accepted on behalf of Westinghouse or National and the price of such scrap was then to be finally determined (R. 7, 8). If the

scrap failed to meet specifications, it would be rejected and there would be no sale. Delivery of the scrap to the refinery for assay and analysis was the paramount feature of the sale, not a mere "short-cut" for the convenience of Westinghouse and National occurring after the completion of an intrastate sale as the court below suggested. Westinghouse and National would not even have considered purchasing and taking delivery of the scrap in Pennsylvania before refinery analysis and then shipping it to the refinery for use in the performance of their respective contracts with American Smelting Company.

The fact situation in the cases in the second category reduced to its simplest terms was this: The seller, either a resident of or doing business in the taxing state, and the buyer made a contract for the sale of goods calling for delivery of the goods to the buyer within the taxing state. The seller then caused the goods to be delivered from a source outside the state directly to the buyer within the state.

In these cases the manner in which the seller arranged for delivery of the goods was immaterial to the performance of the contract of sale. The buyer was concerned only with receiving the goods at his place of business within the taxing state. It made no difference to him whether the goods came from the seller's stock within the state or directly from a source outside the state. Thus the transaction was purely and simply an intrastate sale. Interstate commerce was only incidentally involved because the seller for his own convenience chose to cause the goods to be shipped directly to the buyer from outside the state.

The situation here is quite to the contrary. Delivery of the goods by the seller directly to New Jersey was not merely incidental to the sale but, as pointed out above, was the most important part of the sale. Such delivery was not for the convenience of either seller or purchaser, but was essential to the consummation of the sale.

Cases in the third category, of which *Western Live Stock v. Bureau of Revenue, supra,* is a typical example, are all cases where the tax imposed upon a local activity carried on wholly within the taxing jurisdiction which was separate and distinct from sales in interstate commerce incident to the carrying on of such local activity. Thus, in the *Western Live Stock* case, the Court held that the State of New Mexico could constitutionally impose a tax on the local business of printing a magazine even though the magazine was sold to subscribers outside New Mexico because, in the words of the Court (303 U.S. at 258):

> "* * * the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. * * *"

In the case before the Court there is no local activity which is separate and distinct from the interstate sales to Westinghouse and National. Although one step of each of such sales takes place in Pittsburgh, these sales are single, integrated transactions which cannot be broken into two separate and distinct parts, one part purely intrastate commerce in character and the other in interstate commerce.

IV. Conclusion.

It is submitted that the Supreme Court of Pennsylvania in upholding the mercantile license taxes of the City and School District of Pittsburgh as applied to the gross receipts from the sales by Keystone to Westinghouse and National completely misapplied the decisions of this Court and that the Pennsylvania court's decision is therefore in conflict with the applicable decisions of this Court.

Further, the decision below opens the field of interstate commerce to a multiplicity of local municipal taxes both in Pennsylvania and in other states. For example, in Pennsylvania alone there are at the present time approximately thirty local mercantile taxes in effect, and the trend to this type of privilege tax has been spreading nationwide. Before the "commerce clause" of the Constitution of the United States has been completely emasculated a definitive barrier must be erected by this Court.

Respectfully submitted,

KEYSTONE METAL COMPANY, Petitioner

By EARL F. REED

LEE W. ECKELS
Attorneys

EARL F. REED
LEE W. ECKELS
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh 19, Pa.